(1) Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term, 1996

JAMES COLELLI,

Petitioner

vs.

KENNETH A. SANDT, T/A AND D/B/A 1ST KLAS MARINA AND CRUISER BOATS, A DIVISION OF KCS INTERNATIONAL, INC., AND CRUISTAR, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LENAHAN & DEMPSEY, P.C.
JOSEPH P. LENAHAN
LISA G. WILSON
Attorneys for Petitioner

Suite 400 Kane Building
116 North Washington Avenue
P.O. Box 234
Scranton, PA 18501-0234
(717) 346-2097

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the United States Court of Appeals for the Third Circuit's Judgment Order affirming the District Court's interpretation of Pennsylvania's product line exception to the general rule of non-liability of successor corporations should be reversed when recent case law in Pennsylvania shows a sharp divergence from the Federal Court's interpretation of Pennsylvania law on this issue.

Answered in the affirmative.

B. Whether the United States Court of Appeals for the Third Circuit's Judgment Order affirming the District Court's interpretation of the product line exception should be reversed when other Third Circuit states such as New Jersey show a sharp divergence from the Federal Court's interpretation of this issue.

Answered in the affirmative.

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REFERENCE TO THE UNOFFICIAL REPORTS OF OPINIONS AND ORDERS DELIVERED IN THE COURTS BELOW

A. Order and Memorandum of the Honorable Thomas I. Vanaskie in the United States District Court for the Middle District of Pennsylvania, Docket No. 3:95-CV-422, dated September 19, 1996.

B. Judgment Order of the United States Court of Appeals for the Third Circuit, Docket No. 96-7620, before Greenberg, McKee and Wellford, dated June 26, 1997.

STATEMENT OF JURISDICTION

The Petitioner seeks review of the Judgment Order entered June 26, 1997 by the United States Court of Appeals for the Third Circuit.

Statutory Provision 28 U.S.C. §1254 confers on this Court jurisdiction to review on Writ of Certiorari the Judgment Order in question.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

None.

STATEMENT OF CASE

On June 25, 1993, James Colelli ("Plaintiff") suffered severe third-degree burns over a large portion of his body when his 1972 Cruiser motorboat exploded into flames after it was fueled at 1st Klas Marina on Lake Wallenpaupack, Tafton, Pennsylvania.

The hull identification of the Plaintiff's twenty-two (22) foot Cruiser motorboat indicated that it was manufactured by the Marine Division of the Mirro Corporation ("Mirro"). Mirro's boat manufacturing plant was located in Oconto, Wisconsin.

This matter was initiated on March 20, 1995 by the filing of a Complaint against Defendants Kenneth A. Sandt, t/a and d/b/a 1st Klas Marina and 1st Klas Marina and Cruiser Boats, a Division of KCS International, Inc. ("KCS") in the United States District Court for the Middle District of Pennsylvania. On April 28, 1995, a second Complaint was filed adding Cruistar, Inc. ("Cruistar") as a Defendant. Jurisdiction for this claim was based upon diversity of citizenship and a claim in excess of $50,000, pursuant to 28 U.S.C. §1332.

The Complaint contained allegations of Strict Products Liability against the named Defendants.

On January 16, 1996, Defendant Cruistar and KCS filed a Motion for Summary Judgment, arguing that as successors in interest, they could not be held liable for the actions of Mirro Corporation, the actual manufacturer of the Plaintiff's boat. On January 24, 1996, the Honorable Thomas I. Vanaskie issued an Order which stayed the Defendants' Motion and extended the briefing schedules until depositions of representatives of Cruistar and KCS could be taken. After all briefs were filed and oral argument was heard, Judge Vanaskie issued

an Order and Memorandum on September 19, 1996, granting Defendants' KCS and Cruistar's Motion for Summary Judgment. Judge Vanaskie concluded that the facts of the case did not support any of the exceptions recognized in the Commonwealth of Pennsylvania to the general rule of non-liability of successor corporations for the actions of the predecessor corporation so as to impose liability upon Cruistar or KCS. Specifically, Judge Vanaskie concluded that the Plaintiff had not met the first element of the *Ray* test, *infra*, which is a prerequisite to the imposition of the product line exception.

The Plaintiff appealed Judge Vanaskie's Order and Memorandum dated September 19, 1996 to the United States Court of Appeals for the Third Circuit. Subsequently, on June 26, 1997, the Third Circuit issued a Judgment Order affirming Judge Vanaskie's decision.

During the course of the discovery process, the parties stipulated to the following facts regarding the corporate history of Mirro:

> 1. On April 30, 1982, under terms and conditions set forth in a Sales Agreement dated May 3, 1982, Mirro Corporation transferred the fiberglass boat manufacturing operations of its Mirro Marine Division to Cruisers, Inc.[1]
>
> 2. From April 30, 1982 to August 31, 1988, Mirro Corporation was a corporate entity registered in the State of New Jersey. During this time, Mirro Corporation was acquired by Newell Corporation;
>
> 3. On August 31, 1988, Mirro Corporation was merged out of existence through its merger with the

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[1] Cruistar was initially known as Cruisers, Inc., when it was formed in 1982. It subsequently changed its name to Cruistar in March of 1990. This Petition will refer to both names interchangeably.

Anchor Hocking Corporation by the Newell Corporation. At that time, Mirro became a division of Anchor Hocking Corporation.

4. On November 20, 1994, Newell Corporation transferred the Mirro Division from Anchor Hocking Corporation to Newell Operating Company, a Delaware corporation that is a wholly owned subsidiary of Newell Corporation. As of this date, Mirro is a division of Newell Operating Company.

5. Mirro Corporation, at the present time, no longer exists as a separate corporate entity;

6. Mirro Corporation, and/or Mirro Company, have not engaged in the fiberglass hull boat manufacturing operation since April 30, 1982.

Moreover, at the time of the asset purchase, 7 of the 8 shareholders of Cruisers, Inc. had been employees of Mirro Marine Division. Cruisers, Inc. hired up to 80 out of the 140 Mirro Marine Division employees.

Cruisers, Inc. continued to use Mirro brand name "Cruisers" for its line of fiberglass hull boats. Cruisers, Inc. continued to use the layout system used by Mirro. Cruisers, Inc. sold replacement parts for boats manufactured prior to 1982. Mirro Model names "V-Sport" and "Holiday" were used by Cruisers, Inc.

If any Cruiser boat needed to be refurbished or if a repurchase from the dealer was required, Cruisers, Inc. would take care of the problem and would then split the cost with Mirro.

REASONS FOR ALLOWANCE OF THE WRIT

First Issue

A. The United States Court of Appeals for the Third Circuit's Judgment Order affirming the district court's interpretation of Pennsylvania's product line exception to the general rule of non-liability of successor corporations should be reversed when recent case law in Pennsylvania shows a sharp divergence from the federal court's interpretation of Pennsylvania law on this issue.

The Third Circuit's affirmation of the district court's Order and Memorandum, without opinion unjustly sanctions the district court's divergence from Pennsylvania case law regarding the product line exception to the general rule of non-liability of corporate successors.

In Pennsylvania there are six exceptions to the general rule of non-liability of successor corporations for the actions of the predecessor corporation. In order to hold the acquiring company responsible for the seller's liabilities, one of the following must be established:

1. The purchaser expressly or impliedly agreed to assume the obligations; 2. The transaction amounted to a consolidation or merger; 3. The purchasing corporation was merely a continuation of the selling corporation; 4. The transaction was fraudulently entered into to escape liability; 5. The transfer was without adequate consideration and no provisions were made for creditors of the selling corporation. See *Husak v. Berkel, Inc.*, 234 Pa. Superior Ct. 452, 457, 341 A.2d 174, 176 (1975).

In 1981, the Superior Court adopted the product line exception to successor liability in *Dawejko v. Jorgensen Steel Company,* 290 Pa. Superior Ct. 15, 434 A.2d 106 (1981).[2]

The Superior Court loosely framed the parameters of the product line exception and urged a fact-specific analysis considering various factors including whether the successor corporation advertised itself as an ongoing enterprise; whether it maintained the same product, name, personnel, property and clients; whether it acquired the predecessor corporation's name and goodwill; and whether it required the predecessor to dissolve. The Court also noted that *consideration* of the three-part test enunciated in *Ray v. Alad Corp.,* 19 Cal. 3d 22, 136 Cal.Rptr. 574, 560 P.2d 3 (1977) would also be useful.

In *Ray,* the California Supreme Court ruled that strict liability should be imposed upon a successor to a manufacturer if the following three-part test was met:

> 1. The virtual destruction of the Plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business;
>
> 2. The successor's ability to assume the original manufacturer's risk-spreading role; and
>
> 3. The fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's goodwill being enjoyed by the successor in the continued operation of the business.

The Superior Court, in *Dawejko,* also specifically adopted the formulation of the New Jersey Supreme Court in *Ramirez v. Amsted Industries,* 86 NJ 332, 431 A.2d 811 (1981). The

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[2] Despite the fact that fifteen (15) years has elapsed since the Pennsylvania Superior Court adopted the product line exception in *Dawejko,* the Pennsylvania Supreme Court has yet to deal with the issue.

New Jersey Supreme Court's formulation of the product line exception is set forth as follows:

> Where one corporation acquires all or substantially all of the manufacturing assets of another corporation, even if exclusively for cash, and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in the units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor.

The Superior Court addressed the product line exception in *Hill v. Trailmobile, Inc.*, 412 Pa. Superior Ct. 320, 603 A.2d 602 (1992). The court held that pursuant to *Dawejko*, all three elements of the *Ray* test had to be met in order for the product line exception to apply. However, a close look at the *Hill* decision reveals that the court took a quote from *Dawejko* out of context. Contrary to that which is suggested in *Hill*, the court in *Dawejko* clearly did not adopt the *Ray* test as a prerequisite for the application of the product line exception.[3]

The Superior Court again addressed the product line exception in *Keselyak v. Reach All, Inc.*, 443 Pa. Superior Ct. 71, 660 A.2d 1350 (1995). In that decision, the Court noted that the purpose of the product line exception is to serve the social policies underlying strict liability. In addition, the Court noted that "[t]he New Jersey and Pennsylvania courts have held that the existence of these three [Ray] circumstances is an important, ... although not necessarily the requisite or exclusive, consideration ... in determining whether the prod-

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[3] In *Lacy v. Carrier Corp.*, 939 F. Supp. 375 (E.D. Pa. 1996), the defendant cited *Hill* for the proposition that the product line exception only applies if it was the successor's acquisition that eliminated the plaintiff's remedy. However, after reviewing the *Dawejko* decision, Judge Padova concluded that *Dawejko* did not impose this as an absolute requirement but instead held that it was one factor among many to consider.

uct line exception applies." (Citations omitted.) *Id.* at 78, 660 A.2d at 1353.

In the recent Superior Court case of *Childers v. Power Line Equipment Rentals, Inc.*, 452 Pa. Superior Ct. 94, 681 A.2d 201 (1996), *alloc. granted*, 547 Pa. 735, 690 A.2d 236 (1997), the Pitman Manufacturing Company ("Pitman") which manufactured cranes and hydraulic truck units became a division of A. B. Chance in 1961. The truck at issue in the case was manufactured and sold by the Pitman Division of A.B. Chance in 1970. In May of 1975, A.B. Chance sold its assets, including the Pitman Division, to Emerson. Emerson continued to use the Pitman name and manufactured the same products. Emerson maintained the Pitman name and Pitman's product identification because of customer recognition. Emerson filled accessory orders for the type of truck involved in the case. In 1983, Emerson's Pitman Division was sold to a Canadian company.

After reviewing the exception to the general rule of non-liability of corporate successors, the Superior Court went on to hold that Emerson was subject to successor liability under the "product line" exception. In support of this conclusion the court pointed to the following factors: Emerson purchased all of A.B. Chance's assets, including the Pitman Division; it continued to manufacture and sell trucks under the name of its predecessor (Pitman); and, it enjoyed the goodwill of its predecessor's (Pitman) reputation.

The Superior Court further noted:

> Under the 'product line' exception, this Court has held that where one corporation acquires all of the manufacturing assets of another corporation and undertakes essentially the same manufacturing operation as the selling corporation, as was the case here, the purchasing corporation is strictly liable for injuries caused by defects

> in units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor. Dawejko, supra.

Childers, supra at 116-17, 681 A.2d at 213.

The Superior Court is clearly using a fact-specific analysis considering the relevant factors enunciated in *Dawejko v. Jorgensen Steel Co., supra.* It is interesting to note that there is *no* discussion of the first element of the *Ray* test that requires the virtual destruction of the Plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business.

It seems clear, based on this line of cases, that Pennsylvania courts do not consider the first element of the *Ray* test to be a necessary prerequisite for the application of the product line exception.

According to 28 U.S.C. §1652:

> The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

The Supreme Court has held that the judicial decisions of the state courts are "laws" of the states within the meaning of the above statute. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938). Thus, when this court sits in diversity, it must apply the substantive law of the forum in which it is located. *Id.*

The federal courts are to follow the decisions of the Supreme Court of the state where the state's high court has spoken. See *Commissioner of Internal Revenue v. Estate of Bosch,* 387 U.S. 456, 465, 87 S.Ct. 1776, 1782-83, 18 L.Ed. 2d 886 (1967). In addition, when the highest court of a state has

not ruled on a certain issue, " 'an intermediate appellate state court ... is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise'." *Id.* (quoting *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237, 61 S.Ct. 179, 183-84, 85 L.Ed. 139 (1940)).

Although the case law in Pennsylvania is clear regarding the requirements of the product line exception, there is a split of authority in the federal district courts as to whether it is necessary for the acquisition to destroy the plaintiff's remedy or whether the transferor's subsequent inability to provide a remedy is sufficient to trigger the successor's liability.

In *Lacy v. Carrier Corporation*, 939 F. Supp. 375 (E.D. Pa. 1996), plaintiff was injured in 1993 by an unguarded exhaust fan manufactured by ILG Industries between 1968 and 1972. Subsequently, ILG remained a viable entity after its assets were acquired by Carrier. Carrier sold off ILG in 1978 and ILG remained viable until it filed for bankruptcy in 1991. Carrier argued it could not be held liable pursuant to the product line exception because: (1) its acquisition of ILG's assets did not destroy the plaintiff's remedies against that manufacturer; and, (2) because an intermediate successor corporation cannot be held liable after it has divested the product line. The court rejected both arguments.

The court acknowledged the split of authority in the Eastern District then rejected a contrary holding in *Tracey by Tracey v. Winchester Repeating Arms Co.*, 745 F. Supp. 1099 (E.D. Pa. 1990), *affirmed without opinion*, 928 F.2d 397 (3d Cir. 1991) and followed *Olejar v. Powermatic, Division of DeVlieg-Bullard, Inc.*, 808 F. Supp. 439 (E.D. Pa. 1992), in predicting that the Pennsylvania Supreme Court would hold that a plaintiff does not have to demonstrate that it was the purchaser corporation's acquisition that destroyed the plain-

tiff's remedy against the manufacturer in order to apply the product line exception.

Although there is an acknowledged split in authority in the district courts, the Superior Court's decision in *Childers, supra,* seems to confirm *Lacy's* predictions regarding Pennsylvania law.

In the instant matter, the Third Circuit affirmed, by Judgment Order, Judge Vanaskie's Order and Memorandum.

In his memorandum, Judge Vanaskie relies on his decision in *Federal Ins. Co. v. Glenn D. Livelsberger,* 868 F. Supp. 686 (M.D. Pa. 1994), to interpret the requirements of the product line exception. In that decision, Judge Vanaskie denied the plaintiff's invitation to predict that the Pennsylvania Supreme Court would not require virtual elimination of plaintiff's remedies against the original manufacturer as the *sine qua non* of the product line exception.

In *Federal Ins., supra,* Judge Vanaskie relied on the case of *Conway v. White Trucks,* 885 F.2d 90 (3d Cir. 1989). In that case the Court of Appeals assumed Pennsylvania would follow the *Dawejko* decision but stated:

> We predict ... that [Pennsylvania] would not apply [the product line exception] in cases where the Claimant had a potential remedy against the original manufacturer, but failed to exercise all available means to assist his claim ...
>
> Thus, as a logical matter, the loss of a remedy against the original manufacturer must be a prerequisite to the invocation of the product line exception.

Conway, 885 F.2d at 95.

In the instant matter, Judge Vanaskie also cites to *LaFountain v. Webb Industries,* 951 F.2d 544 (3d Cir. 1991) as supporting said proposition. However, since *Conway* and *La-*

Fountain were decided, there have been at least two judges in the Eastern District that have departed from the Third Circuit's interpretation of Pennsylvania law. See *Olejar, supra* and *Lacy, supra.*[4]

Further, *Conway's* discussion about causation was only in support of that holding and "cannot be construed as predicting the Pennsylvania Supreme Court's position on the causation element." *Tracey by Tracey v. Winchester Repeating Arms Co., supra,* 745 F. Supp. at 1107 n.14 (citing *Conway,* 885 F.2d at 95).

In addition, the Superior Court in *Keselyak, supra* recently noted that New Jersey and Pennsylvania courts have held that the existence of the three *Ray* circumstances is an important, although not necessarily the requisite or exclusive consideration in determining whether the product line exception applies.

Moreover, the Pennsylvania Superior Court, in *Childers,* clearly urged a fact-specific analysis considering the relevant factors enunciated in *Dawejko v. Jorgensen Steel Co., supra.* It is interesting to note that in *Childers* there is no discussion of the first element of the *Ray* test that requires the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business.

Based upon the above, although there is a split in authority over the requirements of the product line exception in the District Courts, it is clear that the Pennsylvania Superior

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[4] In his decision in *Lacy, supra,* Judge Padova indicated he was aware of no authority that holds that each of the criteria set forth in *Dawejko* must be met before the product line exception may be applied. See *Conway v. White Trucks,* 692 F. Supp. 442, 451 (M.D. Pa. 1988) (noting that the *Dawejko* court neither indicated what degree of weight to accord each factor nor decided whether all the factors had to be established in order to impose liability under the exception). *Aff'd,* 885 F.2d 90 (3d Cir. 1989).

Court's decision in *Childers* confirmed *Lacy's* predictions about Pennsylvania law. Judge Vanaskie's reliance on cases which require the first element of the *Ray* test to be established as a prerequisite to the imposition of the product line exception is contrary to the holding in *Lacy*. The Third Circuit's affirmation of Judge Vanaskie's Order and Memorandum unjustly allows the federal courts to continue a line of cases that clearly has diverged from Pennsylvania case law on this issue.

The Plaintiff requests the Supreme Court's intervention in correcting the federal court's continuing line of cases that conclude that the first element of the *Ray* test is a prerequisite for the application of the product line exception under Pennsylvania case law, when Pennsylvania case law clearly states that meeting the requirements of the *Ray* test is *not* mandatory, but are only factors to be considered in making a fact-specific analysis of each case.

To allow the federal courts to continue to apply a different, more stringent test regarding the product line exception in diversity actions than what is being applied in state courts would be a miscarriage of justice.

Moreover, to allow this line of cases to continue would promote forum shopping. Based upon this scenario, defendants would be highly motivated to have cases removed to federal court when at all possible. In the alternative, plaintiffs would be highly disadvantaged to bring a suit in federal court as opposed to Pennsylvania state court.

In light of the Superior Court's decision in *Childers*, it is clear that the Court cases relied upon by Judge Vanaskie in his decision were not accurate in their predictions of Pennsylvania law. Therefore, the Third Circuit Judgment Order affirming Judge Vanaskie's Memorandum and Order should be reviewed by this Court.

In addition to the above, Judge Vanaskie, in his Memorandum, adopted *Morales v. Crompton & Knowles Corp.*, 888 F. Supp. 682 (E.D. Pa. 1995) as good law.

In *Morales*, the court concluded:

> "... that the liability of a successor entity under the product line exception, logically, follows the product line. In other words, when the liability of the manufacturer of the product is destroyed, liability under the product line exception should be transferred to later successors with the product line. Such a rule is fairer than imposing liability arbitrarily upon the earliest viable successor and more closely adheres to the rationale underlying the product line exception, in that *liability remains with the entity still deriving income from manufacturing the product line from which the injury arose.* Moreover, by keeping successor liability with the product line, the risk of injury may be spread over the purchasers of units within that product line."

Id. at 687-88. (Emphasis added.)

Nevertheless, Judge Vanaskie refused to follow this holding when he concluded that there was a "potential" remedy against Newell in this matter. Newell acquired the Mirro Division of Anchor Hocking on November 20, 1994, approximately 17 months *after* the Plaintiff's accident. Moreover, when Newell acquired Mirro in 1994, Mirro had not manufactured fiberglass boats for over 12 years. It is astounding that the Court could conclude that Cruistar, the entity that directly derived income from the product line, would not be a successor corporation and yet conclude that Newell, who had absolutely nothing to do with the product line, could be responsible for Mirro's products.

The Superior Court refused to extend the product line exception for use by defendants in *Hill v. Trailmobile, Inc., supra.* Therefore, when the Mirro Corporation was merged out of existence in 1988, Plaintiff ceased to have a remedy against Mirro.

For these important reasons, the Plaintiff respectfully requests this Court to review the Third Circuit Judgment Order affirming Judge Vanaskie's Memorandum and Order.

Second Issue

B. The United States Court of Appeals for the Third Circuit's Judgment Order affirming the district court's interpretation of the product line exception should be reversed when other Third Circuit states such as New Jersey show a sharp divergence from the federal court's interpretation of this issue.

Pennsylvania Superior Court decisions are also in line with other Third Circuit states, such as New Jersey, regarding the requirements of the product line exception.

The New Jersey Supreme Court adopted the product line exception in *Ramirez v. Amsted Industries, Inc.*, 86 NJ 332, 431 A.2d 811 (1981) relying upon *Ray* as well as other cases. Its formulation of the product line exception is set forth as follows:

> Where one corporation acquires all or substantially all of the manufacturing assets of another corporation, even if exclusively for cash, and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in the units of the same product line,

> even if previously manufactured and distributed by the selling corporation or its predecessor.

Ramirez, supra, 86 NJ at 358, 431 A.2d at 825.

The New Jersey Superior Court addressed the product line exception in *Pacius v. Thermtroll Corp.*, 259 NJ Superior Ct. 51, 611 A.2d 153 (1992).

In *Pacius, supra,* the New Jersey Superior Court was concerned about the possible consequences of interpreting *Ray* as an absolute requirement that predecessor corporations be destroyed by a successor and cited the following excerpts:

> Narrow construction of this policy justification as a condition precedent would encourage corporations to limit their liability by requiring sellers to retain their corporate existence after the acquisition. Thus, Plaintiffs would be forced to look to the seller, who has minimal assets, which might be insufficient to satisfy product liability claims. Therefore, dissolution of the predecessor manufacturer should be irrelevant in determining successor corporate liability. The goal of products liability, namely, to burden the successor corporation which benefits from the product line and is better equipped to spread the costs of injury throughout society, is best served by holding the current manufacturer responsible regardless of the viability of its predecessor. 12 Seton Hall, 327, 344-345 (1982).

Id., 611 A.2d at 156.

The court in *Pacius* went on to hold:

> Therefore, dissolution of the predecessor manufacturer should be irrelevant in determining successor corporation liability. The goal of products liability, namely, to burden the successor corporation which benefits from a product line and is better equipped to spread the cost of

> injury through society, is best served by holding the current manufacturer responsible, regardless of the viability of its predecessor.
>
> The Court concludes that the first criteria of Ray is met where the predecessor company is no longer viable. It is the fact of non-viability that supports the imposition of liability. Any discussion with regard to the reasons for the demise of the predecessor is irrelevant. The first criteria of Ray cannot, therefore, be considered an essential element for the imposition of liability.

Id.

Interestingly, the Pennsylvania Superior Court in *Dawejko, supra,* specifically adopted the New Jersey Supreme Court's holding in *Ramirez.*

Moreover, in *Olejar v. Powermatic, Division of DeVlieg-Bullard, Inc., supra,* Judge Hutton noted that the *Dawejko* court embraced the definition of the product line exception as stated by the New Jersey Supreme Court in *Ramirez* and ruled that Pennsylvania courts would continue to follow New Jersey precedent on the issue of whether the causal requirement was mandatory. Judge Hutton then cited *Pacius* as the most recent precedent which the Supreme Court would likely follow.

Because Pennsylvania specifically adopted New Jersey's formulation of the product line exception, it is logical to assume that the Third Circuit's affirmance of the instant case and the line of cases relied on by Judge Vanaskie will have an influence on New Jersey law.

Like Pennsylvania, New Jersey law does not require the first element of the *Ray* test to be met in order for the product line exception to apply.

To allow the Third Circuit to sanction the line of cases relied upon by Judge Vanaskie would provide precedent for

district courts in New Jersey to follow. Therefore, federal courts in New Jersey could possibly diverge from state law in the same manner as in Pennsylvania.

Another scenario could be that, although Pennsylvania and New Jersey have virtually identical tests for the product line exception, Pennsylvania district courts would require the first element of the *Ray* test to be satisfied, whereas New Jersey district courts would not have this requirement. This would lead to a conflict within the Circuit that could create chaos.

Therefore, for the special and important reasons mentioned above, the Plaintiff respectfully requests this Honorable Court to grant his Petition for Certiorari to review the issues raised in this Brief.

Respectfully submitted,
LENAHAN & DEMPSEY, P.C.
JOSEPH P. LENAHAN
LISA G. WILSON

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 96-7620

JAMES COLELLI, Appellant v. KENNETH A. SANDT, t/a and d/b/a 1st Klas Marina; CRUISER BOATS, a Division of KCS International, Inc.; KLAS, INC., d/b/a 1st KLAS MARINA; CRUISTAR, INC.

On Appeal from the United States District Court for the Middle District of Pennsylvania
(D.C. Civ. No. 95-cv-0422)
District Judge: Honorable Thomas I. Vanaskie

Submitted Pursuant to Third Circuit LAR 34.1 (a)
June 24, 1997

Before: GREENBERG, McKEE, and WELLFORD,*
Circuit Judges.

JUDGMENT ORDER

Appellant appeals from the district court's order granting summary judgment in favor of appellees on grounds that the court misapplied Pennsylvania's exceptions to the general rule

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* The Honorable Harry W. Wellford, Senior Circuit Judge for the Sixth Circuit, sitting by designation.

of non-liability of successor corporations for the actions of the predecessor corporation.

After careful review of the record and consideration of all the contentions raised by appellant it is

ADJUDGED AND ORDERED that the order of the district court dated September 20, 1996 granting summary judgment in favor of the appellees be and is hereby affirmed substantially for the reasons set forth in the district court's opinion.

Costs taxed against the appellant.

BY THE COURT,
/s/illegible
Circuit Judge

Attest:
/s/P. Douglas Sisk, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 3:95-CV-422
HON. THOMAS I. VANASKIE

JAMES COLELLI, Plaintiff v. KENNETH A. SANDT, t/a and d/b/a 1st KLAS MARINA, and KLAS, INC., d/b/a 1st KLAS MARINA, and CRUISER BOATS, a division of KCS INTERNATIONAL, INC., and CRUISTAR, INC., Defendants

ORDER

September 19, 1996

AND NOW, THEREFORE, in accordance with the attached memorandum, IT IS HEREBY ORDERED:

1.) Defendants Cruistar and KCS' motion for summary judgment as to the claims asserted against them in the complaint (Dkt. Entry 42) is GRANTED.

2.) Defendants Cruistar and KCS's motion for summary judgment as to the cross-claims set forth against them by defendant Kenneth Sandt, and Klas, Inc. (Dkt. Entry 65), is GRANTED.

3.) The Clerk of Court is directed to enter judgment in favor of Defendants Cruistar, Inc. and KCS, International.

/s/Thomas I. Vanaskie
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 3:95-CV-422
HON. THOMAS I. VANASKIE

JAMES COLELLI, Plaintiff v. KENNETH A. SANDT, t/a and d/b/a 1st KLAS MARINA, and KLAS, INC., d/b/a 1st KLAS MARINA, and CRUISER BOATS, a division of KCS INTERNATIONAL, INC., and CRUISTAR, INC., Defendants

MEMORANDUM

This action involves personal injury claims arising from an accident occurring on June 25, 1993, in which plaintiff James Colelli suffered burns when his 1972 motorboat caught fire after having been serviced and fueled by employees of defendant 1st Klas Marina. Colelli contends that defendants Cruistar, Inc. ("Cruistar") and KCS, International ("KCS") are liable for defects in the boat, built by Mirro Corporation ("Mirro"), which allegedly caused the fire and the explosion.[1] Because neither Cruistar nor KCS designed, built, or sold the boat, or even existed when the boat was built in 1972, Colelli seeks to recover against these defendants based on the theory of successor liability. Defendants Cruistar and KCS have moved for summary judgment. (Dkt. Entry 42.)[2] In view of the

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[1] Colelli has also asserted claims against Kenneth Sandt t/a and d/b/a 1st Klas Marina and Klas, Inc., d/b/a 1st Klas Marina, for strict liability and negligence. Colelli contends that those defendants caused Colelli's injuries by negligently fueling his boat moments before the explosion and are strictly liable for engaging in ultrahazardous or abnormally dangerous activities involving the storage and delivery of gasoline. By Order dated September 9, 1996, a motion for summary judgment on behalf of those defendants was denied. (Dkt. Entry 81.)

[2] Defendants Kenneth A. Sandt and 1st Klas Marina have asserted cross-claims for contribution or indemnification against Cruistar and KCS. On June 28,

absence of any evidence to support any of the exceptions to the general rule that liability for the torts of a predecessor entity is not ordinarily imposed upon a corporation which acquires the assets and the business of another company, defendants' motions for summary judgment will be granted, and judgment will be entered in favor of Cruistar and KCS.

I. BACKGROUND

Colelli seeks compensation for serious injuries he suffered when his twenty-two foot cruiser boat caught fire and exploded. The parties agree that the hull identification of the boat indicates that it was manufactured in 1972 by the Marine Division of Mirro, which was located in Oconto, Wisconsin.

On April 30, 1982, Cruisers, Inc., purchased the assets of Mirro's Marine Division fiberglass boat manufacturing operations.[3] Following the asset purchase, Mirro continued to exist as a publicly traded, billion-dollar consumer product manufacturing entity. It was subsequently acquired by the Newell Corporation ("Newell"), which, to date, is still in existence.[4]

1996, Cruistar and KCS filed a motion for summary judgment as to these cross-claims. (Dkt. Entry 65.) This motion merely sets forth that counsel for plaintiff and counsel for defendants Sandt and 1st Klas Marina have indicated their concurrence that if the Court grants summary judgment in favor of Cruistar and KCS and against Colelli on the successorship issue in their motion regarding the complaint (Dkt. Entry 42), it would also be appropriate to grant summary judgment in favor of Cruistar and KCS on the cross-claims. (Dkt. Entry 65.) This motion, therefore, does not require separate analysis.

[3] Cruistar was initially known as Cruisers, Inc. when it was formed in 1982. It subsequently changed its name to Cruistar, Inc., in March of 1990, and will be referred to as "Cruistar" herein.

[4] The parties have entered into a stipulation regarding the corporate status of Mirro. That stipulation indicates that from April 30, 1982 to August 31, 1988, Mirro was a corporate entity registered in the State of New Jersey. During this time, Mirro was acquired by Newell. On August 31, 1988, Miro [sic] was merged out of existence through its merger with the Anchor Hocking Corporation ("Anchor Hocking") by Newell. At that time, Mirro became a division of Anchor Hocking. On November 20, 1994, Newell transferred the Mirro division from Anchor

Cruistar owned the boat manufacturing assets in Oconto, Wisconsin, from 1982 through January 1993, when a judgment of foreclosure was entered against it in favor of Bank One, Green Bay. In March of 1993, the Cruistar assets that were the subject of the foreclosure were sold by Bank One, Green Bay, to Stock Acquisitions, Inc., now known as KCS. Real estate owned by Cruistar was also sold to KCS. Cruistar did not dissolve after these purchases and continues to exist.

Defendants Cruistar and KCS filed a motion for summary judgment as to the claims asserted against them in the complaint, along with supporting exhibits and a statement of undisputed material facts on January 16, 1996. (Dkt. Entries 42-44.) On January 24, 1996, these defendants filed a supporting brief (Dkt. Entry 49), and on June 3, 1996, they filed a supplemental brief in support of their motion for summary judgment. (Dkt. Entry 60.) Colelli filed a brief along with exhibits in opposition to defendants' summary judgment motion on June 18, 1996. (Dkt. Entry 62.) Defendants filed a substituted reply brief on August 1, 1996. (Dkt. Entry 79.) Oral argument was held on defendants' motion for summary judgment on September 6, 1996.[5]

II. DISCUSSION

A. *Standard of Review*

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions

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Hocking to Newell Operating Company, a Delaware corporation that is a wholly owned subsidiary of Newell. As of the date of the stipulation, Mirro is a division of Newell Operating Company. Mirro no longer exists as a separate corporate entity. Mirro Corp. and/or Mirro Company have not engaged in the fiberglass hull boat manufacturing operation since April 30, 1982. (Dkt. Entry 79 at Ex. "A.")

[5] Since Colelli has failed to file a reply to defendants' statement of undisputed material facts as is required by Local Rule 7.4, the moving defendants' statement of facts will be accepted as true. Independent of this, however, it appears from the parties' filings and the arguments set forth during oral argument that the underlying historical facts germane to the issue of successor liability are generally uncontested.

on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is "material" if proof of its existence or non-existence might affect the outcome of the suit under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Facts that could alter the outcome are material facts." *Charlton v. Paramus Board of Education*, 25 F.3d 194, 197 (3rd Cir.), *cert. denied*, 130 L.Ed.2d 503 (1994).

"Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. There is no issue for trial unless sufficient evidence favors the nonmoving party so that a jury could return a verdict for that party. *Id.* at 249. Rule 56 requires the entry of summary judgment, after adequate time for discovery, where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Initially, the moving party must show the absence of a genuine issue concerning any material fact. *Celotex*, 477 U.S. at 329. All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to the non-moving party. *Continental Ins. Co. v. Bodie*, 682 F.2d 436 (3rd Cir. 1982). Once the moving party has satisfied its burden, the non-moving party "must present affirmative evidence to defeat a properly supported motion for summary judgment." *Anderson*, 477 U.S. at 256-57. "Such affirmative evidence—regardless of whether it is direct or circumstantial—must amount to more than a scintilla, but may amount to less ... than a preponderance." *Williams v. Borough of West Chester*, 891 F.2d 458, 460-61 (3rd Cir. 1989). The affirmative

evidence must consist of verified or documented materials. Mere conclusory allegations or denials taken from the pleadings are insufficient to withstand a motion for summary judgment once the moving party has presented evidentiary materials. *Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3rd Cir. 1990). In determining whether an issue of material fact exists, the court must consider all evidence in the light most favorable to the non-moving party. *White v. Westinghouse Elec. Company*, 862 F.2d 56, 59 (3rd Cir. 1988).

B. *Law Governing Successor Liability*

The general rule in Pennsylvania is that "where one company sells or transfers all of its assets to another, the second entity does not become liable for the debts and liabilities, including torts, of the transferor." *Polius v. Clarke Equipment Company*, 802 F.2d 75, 77 (3rd Cir. 1986); *see also Conway v. White Trucks A Div. Of White Motor Corp.*, 885 F.2d 90 (3rd. Cir. 1989); *Husak v. Berkel, Inc.*, 234 Pa. Super. 452, 341 A.2d 174 (1975). There are, however, exceptions to this general rule of non-liability. These exceptions exist where (1) the purchaser of assets expressly or impliedly agrees to assume the obligations of the transferor; (2) the transaction amounts to a consolidation or a merger; (3) the purchasing corporation is merely a continuation of the transferor corporation; or (4) the transaction is fraudulently entered into to escape liability.[6] *Conway*, 885 F.2d at 93; *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303 (3rd Cir.), *cert. denied*, 474 U.S. 980 (1985).

In addition, Pennsylvania has adopted a fifth exception to the general rule of nonliability, known as the "product line exception." *See Keselyak v. Reach All, Inc.*, 443 Pa. Super. 71, 660 A.2d 1350 (1985); *Dawejko v. Jorgenson Steel Co.*, 290 Pa. Super. 15, 434 A.2d 106 (1981). The "product line exception"

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[6] Colelli has conceded that the evidence of record does not support the applicability of this last exception to this case.

began in California with *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3 (1977). There, the court explained that the policy to be promoted under the exception was the protection of otherwise defenseless victims of manufacturing defects by spreading the cost throughout society. As a result, the court found liability could be imposed upon a successor if: (1) the plaintiff's remedies against the original manufacturer were virtually destroyed by the successor's acquisition of the business; (2) the successor had the ability to assume the original manufacturer's risk-spreading role; and (3) fairness required the successor to assume responsibility for a defective product which was a burden necessarily attached to the goodwill of the original manufacturer which the successor enjoyed by the continued operation of the business. *Ray*, 560 P.2d at 8-9. In *Dawejko, supra*, the Pennsylvania Superior Court adopted the "product line exception" as Pennsylvania law. 434 A.2d at 111. Recognizing the philosophical origins of the exception, the court believed it was better not to phrase the exception too tightly. It considered the three-part test of *Ray, supra*, as relevant and useful, but declined to make its elements absolute requirements. *Dawejko*, 434 A.2d at 111; *see also Olejar v. Powermatic Div. of DeVlieg-Bullard, Inc.*, 808 F.Supp. 439, 443 (E.D. Pa. 1992).[7]

D. *Successor Liability of Cruistar*

1. Assumption of Liability

It is clear that Cruistar did not expressly assume liability for products manufactured by Mirro before 1982. On the contrary, in the Asset Purchase Agreement Cruistar explicitly

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[7] Other factors courts have found relevant to the application of the "product line exception" include whether the successor advertised itself as an ongoing enterprise; whether it maintained the same product, name, personnel, property, and clients; whether it acquired the predecessor's name and good will; and whether it required the predecessor to dissolve. *Conway*, 885 F.2d at 93, *citing Dawejko*, 434 A.2d at 111.

disclaimed liability for products manufactured by Mirro prior to 1982.

Colelli argues that there is an issue of fact as to whether Cruistar implicitly assumed liability for injuries caused by Mirro's products. In support of this argument he cites the deposition testimony of Cruistar Chairman Thomas Lisle to the effect that if a boat manufactured before Cruistar's purchase of Mirro's assets in 1982 needed to be repurchased or refurbished due to the insolvency of a dealer, Cruistar would send out a representative to take care of the problem. (Dkt. Entry 62 at 10.)

This evidence is plainly insufficient to establish an inference that Cruistar implicitly assumed liability for injuries caused by Mirro's products. In this regard, the clear language of the Asset Purchase Agreement itself defeats Colelli's assertion. In the agreement, Cruistar expressly assumed liability *only* for boats sold after the closing date in 1982, and expressly disclaimed liability for any other liability of Mirro not expressly assumed. (*See* Agreement (Dkt. Entry 44, Ex. 1, at ¶¶ 3 and 6).) It cannot be said that by refurbishing Mirro's boats Cruistar assumed, by implication, that which it expressly disclaimed in the agreement. Moreover, Cruistar has presented uncontradicted evidence that initially Mirro, and later Mirro's parent, acknowledged responsibility to handle claims based on alleged defects in Mirro's boats. The clear and unambiguous words in the Purchase Agreement, the evidence submitted by Cruistar, and the patent lack of relevance of the evidence on which Colelli relies are determinative of this issue.

2. Consolidation or Merger

The next issue is whether the asset purchase by Cruistar constitutes a consolidation or merger with Mirro. In determining whether a particular transaction amounts to a *de facto* merger or mere continuation of the predecessor, most courts consider four factors: (i) continuity of management, personnel,

physical location, assets, and general business operations; (ii) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (iii) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (iv) continuity of ownership/shareholders. *Hercules*, 762 F.2d 303, 310 (3rd Cir. 1985) (citations omitted); *Girard v. Allis Chalmers Corp., Inc.*, 787 F.Supp. 482, 487 (W.D. Pa. 1992).

Colelli, again citing the deposition of Thomas Lisle, notes that seven of the eight Cruistar shareholders were former employees of Mirro; the former manager of Mirro's marine division was one of Cruistar's largest shareholders, owning 41% of the stock; Cruistar hired 70 to 80 of the 140 Mirro employees involved in the Marine division; and Mirro carried the debt for the Asset Purchase Agreement. (Dkt. Entry 62 at 10-11.) In response, Cruistar contends that in either a merger or a consolidation, the end result is only one corporation. *Knapp v. North American Rockwell Corporation*, 506 F.2d 361, 365 (3rd Cir. 1974), *cert. denied*, 421 U.S. 965 (1975). *Knapp* states that a "merger of two corporations contemplates that one will be absorbed by the other and go out of existence," and in a consolidation "all the combining corporations are deemed to be dissolved and lose their identity." *Id.* In addition, the court in *Morales v. Crompton & Knowles Corp.*, 888 F.Supp. 682, 685 (E.D. Pa. 1995), cited *Knapp* and observed that to determine whether successor liability may be imposed on the basis of a merger, "we look to whether one corporation absorbed another, which was then dissolved, leaving the acquiring corporation as the only remaining viable entity."[8]

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[8] Cruistar also cites the Pennsylvania Business Corporations Law ("BCL"), and *Schweiner v. Hartford Accid. & Indemn. Co.*, 120 Wis.2d 344, 354 N.W.2d 767, n.2 (Wis. App. 1984), which direct that following a consolidation or a merger there exists only a "single corporation." (Dkt. Entry 79 at 6-7 n.2-3.)

It is undisputed that in 1982, Cruistar only purchased certain assets from Mirro. The parties have stipulated that after that asset purchase, Mirro continued to exist as a corporation. (*See* Stipulation (Dkt. Entry 79, Ex. "A") at ¶2(b).) It is also undisputed that there was no identity of officers or directors between Mirro and Cruistar. Neither Mirro nor Cruistar owned any stock in the other corporation, and the majority stockholders of each corporation were distinct. This is clearly not a circumstance where two or more corporations combined and formed one corporate entity after dissolving their previous corporate entities.

Colelli does not refute the authority cited by Cruistar denying the existence of a merger or consolidation when, as in the case at bar, two independent corporations continue to exist after a transaction. Because the stipulation of the parties establishes that Mirro continued to exist as a viable separate company after the asset purchase in 1982, the elements of a *de facto* merger are not present. In this regard, the facts of the case at bar are similar to those of *Girard v. Allis Chalmers Corp., Inc.*, 787 F.Supp. 482 (W.D. Pa. 1992), where the court rejected an argument similar to that advanced by Colelli in the instant case. There, the court stated that fatal to plaintiff's maintenance of a successor liability suit based on the *de facto* merger theory was the continuation in business of the predecessor corporation. This was so despite the fact that, prior to the accident, the predecessor corporation had divested itself of its construction equipment division which manufactured the alleged defective bulldozer forming the basis for the suit, and entirely ceased manufacturing bulldozers altogether. The court observed that this "was not the legal equivalent of the liquidation and dissolution of the seller corporation." *Girard*, 787 F.Supp. at 487.

Similar to the plaintiff in *Girard*, Colelli contends that the merger exception should apply to impose liability on Cruistar

because, as of the asset purchase in 1982, Mirro no longer produced fiberglass boats similar to the one involved in Colelli's accident. For the reasons set forth in *Girard*, this argument lacks merit and must be rejected. Indeed, it is the continued existence of the predecessor corporation which is relevant to this determination, not the type of business engaged in by the corporation.

3. Continuation of Transferor Corporation

The standards applied under the "merger" exception are also relevant to determine whether Cruistar is a mere continuation of Mirro. *See Luxliner P.L. Export Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 73 (3rd Cir. 1993). "In a continuation, a new corporation is formed to acquire the assets of an extant corporation which then ceases to exist." *Knapp*, 506 F.2d at 365. Factors relevant to the "continuation" exception include a common identity of officers, directors, and stock between the selling and purchasing corporations, and only one corporation after the transfer. *Morales*, 888 F.Supp. at 685, *citing Dawejko*, 434 A.2d at 108 (emphasis added).

The parties essentially rely on their arguments regarding the "merger" exception to support their positions as to this exception. Cruistar again cites to *Knapp* and *Morales, supra*, to argue that, as in the case of a consolidation or merger, the critical element is that, in the end, there is but one corporation and the earlier corporation ceases to exist. Cruistar, therefore, contends that because the parties stipulate that both corporations existed after the asset purchase in 1982, Cruistar was not a continuation of Mirro and the third exception does not apply as a matter of law.

Colelli again cites to the deposition of Thomas A. Lisle in an attempt to establish the existence of a dispute as to material facts concerning the issue of continuation. Colelli relies on the fact that after the asset purchase, Cruistar continued to manu-

facture fiberglass hull boats of the same size as was produced by Mirro; Cruistar continued to sell replacement parts for boats prior to 1982, while Mirro did not sell any parts after 1982; Cruistar continued to use Mirro's layout system and had the ability to collect accounts receivable from Mirro's dealers; and Cruistar received $1.5 million in finished and partially finished boats and raw materials, including engines, wood, etc., from Mirro and further acquired all of Mirro's patents, trademarks, and contracts for buying raw materials. In addition, customers who had boats in the process of being manufactured at the time of the asset purchase had the option of having the order filled by Cruistar. (Dkt. Entry 62 at 11-12.)

Again, Colelli fails to cite authority to show that these facts establish that Cruistar was a continuation of Mirro, especially in light of the stipulation that Mirro remained in existence after the asset purchase. In this regard, Cruistar submits that similar to the above analysis of the "merger" exception, none of the cited testimony dispels the fact that Mirro did not cease to exist after the asset purchase and that, as a matter of Pennsylvania law, the transaction cannot constitute a "continuation." (Dkt Entry 79 at 9 n.5.) Similar to the previous analysis, the continued existence of Mirro as a viable corporation following the asset purchase is fatal to the application of this exception.

4. Product Line Exception

In contrast to the other exceptions to the general rule of successor non-liability, the product line exception shifts the emphasis away from corporate form and formalities and focuses instead on corporate activity, specifically the nature of the business operations. *See Morales*, 888 F.Supp. at 685, *citing Dawejko*, 434 A.2d at 108 and *Conway*, 885 F.2d at 93. In *Dawejko, supra*, the Pennsylvania Superior Court adopted the following expression of the product line rule:

> Where one corporation acquires all or substantially all the manufacturing assets of another corporation, even if exclusively for cash, and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor.

Dawejko, 434 A.2d at 110.

I recently addressed the application of the "product line exception" in *Federal Ins. Co. v. Glenn D. Livelsberger, Inc.*, Civ. A No. 94-438, 868 F.Supp. 686 (M.D. Pa., Sept. 12, 1994) (Vanaskie, J.). In that case, I denied plaintiff's "invitation" to predict that the Pennsylvania Supreme Court would not require virtual elimination of plaintiff's remedies against the original manufacturer as the *sine qua non* of the product line exception because our Court of Appeals had already made its prediction on this point. In the *Federal Ins. Co.* decision, I cited and relied on *Conway, supra*, in which our Court of Appeals directed:

> We predict ... that [Pennsylvania] would not apply [the product line exception] in cases where the claimant had a potential remedy against the original manufacturer, but failed to exercise all available means to assert his or her claim.
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> * * *
>
> ... Thus, as a logical matter, the loss of a remedy against the original manufacturer must be a prerequisite to the invocation of the product line exception. Otherwise, the exception would in effect swallow the general rule of successor non-liability.

Conway, 885 F.2d at 95. Additionally, in *LaFountain v. Webb Industries Corp.*, 951 F.2d 544, 548 (3rd Cir. 1991), the Third

Circuit reaffirmed that a prerequisite to application of the product line exception is the lack of a remedy against the predecessor entity. Based on these cases and the arguments of counsel, I held that the plaintiff could not avail itself of the product line exception because there had been available to it potential remedies against the predecessor corporation that the plaintiff had failed to pursue. *Federal Ins. Co.*, 868 F.Supp. at 691.

Cruistar persuasively argues that the first element of the "product line exception," originally set forth in *Ray, supra*, requiring the virtual destruction of the plaintiff's remedies against the original manufacturer *caused by the successor's acquisition of the business*, renders this exception inapplicable here.[9] It is evident that as of this date, Colelli no longer has a remedy against Mirro, the manufacturer of the boat. But this loss of a remedy was not caused by Cruistar's asset purchase. Cruistar is correct when it argues that this lack of remedy was due to Colelli's failure to name the proper defendant and avoid this action being time-barred by the applicable statutes of limitations.[10]

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[9] Cruistar cites to *South Bend Lathe, Inc. v. Amsted Industries, Inc.*, 925 F.2d 1043, 1047 (7th Cir. 1991), which held that "[t]he continuation of the predecessor corporation bars recovery from the successor under the product line rule in every decision we have found that considers the issue." *South Bend, supra*, was cited approvingly by our Court of Appeals in *LaFountain*, 951 F.2d at 547.

[10] Colelli was injured on June 25, 1993. Based on the two year statute of limitations accruing on the date of injury for claims based on negligence and strict liability, 42 P.S. §5524, the statute had run on those actions on June 25, 1995. It also appears that the statute of limitations bars a breach of warranty claim against Mirro. At least with regard to the negligence and strict liability claims, it is evident that Colelli had an opportunity to preserve his remedy against Mirro or its direct corporate successor, Newell Operating Company. In this regard, it would appear that the merger exception to the general rule of no successor liability pertains to Newell Operating Company. Moreover, as noted above, it is uncontroverted that

During oral argument on this motion, counsel for Cruistar argued that Colelli had a remedy against the original manufacturer up until the expiration of the statute of limitations, June 25, 1995. He submitted that for six years after the asset purchase Mirro existed as an independent corporate entity apart from Cruistar and that subsequent to its merger with Anchor Hocking by the Newell on August 31, 1988, Newell defended claims brought against Mirro.

Conversely, counsel for Colelli contended that August 31, 1988, was the pivotal date because as of that date there no longer existed a remedy against Mirro since there was no Mirro Corporation subject to suit. Colelli cites the parties' stipulation that as of the asset purchase in 1982, Mirro no longer produced fiberglass hulled boats and relies on the case of *Morales, supra,* to support the proposition that Anchor Hocking and Newell could not be Mirro's successors in interest subject to suit. Cruistar responded that the fact that Mirro no longer produced fiberglass hulled boats was legally immaterial.

A review of the case law and the evidence submitted by the parties supports Cruistar's argument. Indeed, the affidavit of Thomas Lisle, the chairman of Cruistar, sets forth that "[b]oth Mirro and Newell have since 1982, responded to all warranty claims as well as periodic product liability claims made against Cruistar concerning the boats that were built and sold by Mirro." (*See* Lisle Aff. (Dkt. Entry 44) at 3.) This

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Newell has acknowledged responsibility to handle products liability claims involving Mirro products manufactured before 1982. Since this action was filed against the other defendants in March of 1995, the determinative factor in the loss of a remedy against Mirro was Colelli's failure to name the proper defendant. *See Merry v. Westinghouse Electric Corp.*, 684 F.Supp. 847 (M.D. Pa. 1988) (the inability to name the proper defendant does not toll the running of the statute of limitations). In this regard, it is Colelli who shoulders the burden of showing that he does not have a remedy against Mirro or its direct corporate successor, Newell Operating Company. Colelli has not shown that as of the date he filed this lawsuit he had no remedy against either Mirro or Newell Operating Company.

statement remains uncontroverted. Colelli has failed to submit any affidavits pursuant to Fed.R.Civ.P. 56(f) requesting additional discovery on the issue of whether Newell or Anchor Hocking were entities subject to suit for the claims based on boats produced by Mirro. The evidence contained in the record demonstrates that Cruistar had a potential remedy against Newell which it failed to pursue. Thus, Colelli failed to avail himself of every opportunity to find a remedy against the original manufacturer as is required to invoke the product line exception. *Conway*, 885 F.2d at 93.[11] For these reasons, this exception to the general rule of non-liability for successor companies does not apply to the instant case to impose liability on Cruistar.[12]

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[11] During oral argument counsel for the parties disagreed as to their respective burdens regarding the existence of a remedy against Mirro and Newell. Counsel for Colelli argued that his burden of establishing that no remedy existed against the manufacturing corporation was satisfied through the stipulation that as of 1988 Mirro was merged out of existence. This argument lacks merit. Cruistar has submitted the uncontested affidavit of Thomas Lisle, which states that both Mirro and Newell have, since 1982, responded to all warranty claims as well as periodic product liability claims made against Cruistar concerning boats that were built and sold by Mirro. Colelli has failed to controvert this contention. Since this evidence remains unrefuted, it is sufficiently established that the remedy against the manufacturer had not been destroyed prior to the expiration of the limitations period.

[12] Other justifications for the finding of the inapplicability of the product line exception exist. Namely, even if Colelli could establish that his remedies against the original manufacturer had been destroyed prior to the running of the statute of limitations, it is clear he could not show that the destruction of the remedies had been caused by Cruistar's acquisition of the business. *See Tracey v. Winchester Repeating Arms Co.*, 745 F.Supp. 1099 (E.D. Pa. 1990), *aff'd mem.*, 928 F.2d 397 (3rd Cir. 1991) (causation is a required element of the product line exception). *But see Olejar v. Powermatic Div. of DeVlieg-Bullard, Inc.*, 808 F.Supp. 439, 444 (E.D. Pa. 1992); *Lacy v. Carrier Corporation*, 1996 WL 363927 (E.D. Pa.) (causation element is not a prerequisite for application of the product line exception in Pennsylvania). In his brief in opposition, Colelli baldly states, without explanation or elaboration, that his remedies against Mirro were virtually destroyed by Cruistar's acquisition of the business. He fails to cite to anything in the record that supports this claim.

D. *Successor Liability of KCS*

The arguments advanced by Colelli to impose successor liability upon KCS are limited to two. He submits that KCS is a continuation of Mirro and that KCS's acquisition of Cruistar's assets meets the requirements of the product line exception. Neither of these exceptions to the general rule of non-liability of successor corporations apply to KCS in the case at bar.

1. Continuation of Transferor Corporation

The basis for Colelli's argument as to the continuation issue comes from the deposition testimony of James Viestenz. Based on his testimony, Colelli asserts that KCS was formed in order to "perpetuate" a boat construction business and that KCS hired former Cruistar shareholders who were also Cruistar employees. Colelli also contends that KCS received from Cruistar replacement parts, drawings, diagrams, mechanical information, electrical specifications, along with customer, dealer, and vendor lists. He further alleges that KCS continued to manufacture boats under the "Cruiser" name, and continued to sell replacement parts for "Cruiser" boats. (Dkt. Entry 62 at 14.)

In light of the determination that Cruistar cannot be held liable on a continuation theory for injuries purportedly caused by allegedly defective Mirro products, it necessarily follows that KCS cannot be held liable on this theory. Even if the continuation theory was applicable to Cruistar, however, liability could not be imposed.

Under Pennsylvania law, the "continuation" exception applies "when there is a common identity of officers, directors, and stock between the selling and purchasing corporations, and only one corporation after the transfer." *Dawejko*, 434 A.2d at 108. In this case, it is undisputed that the stockholders of Cruistar are totally different from the stockholders of KCS. None of Cruistar's stockholders have ever been stockholders of KCS. All of KCS's stock is owned by K.C. Stock, who has never been affiliated with Cruistar. Nor is there a common

identity of directors and officers of the two corporations. The only two members of Cruistar's Board of Directors, Tom Lisle and Terry Bogart, have never had any involvement or affiliation with KCS. Moreover, the only director of KCS is K.C. Stock, who also serves as its chief executive officer and, as stated above, is in no way connected to Cruistar. Nor has the president of KCS, Jim Viestenz, ever had any involvement with Cruistar. (*See* Aff. of Jim Viestenz (Dkt. Entry 44).)

While two former vice presidents of Cruistar assumed similar positions with KCS, after completing applications and interviews, and certain similarities exist in terms of their respective operations, the record is devoid of the requisite continuity of officers, directors and stock between the corporations needed to support imposition of liability on KCS based on this exception.[13] For these reasons, KCS cannot be found liable in the instant case under the "continuation" exception.

2. Product Line Exception

As stated above, the product-line exception provides that a successor corporation is strictly liable for the injuries caused by the predecessor's products if the corporation acquires all or substantially all of the manufacturing assets and undertakes the same manufacturing operation. *Keselyak v. Reach All, Inc.*, 443 Pa. Super. 71, 660 A.2d 1350, 1353 (1995) (citations omitted). If the predecessor continues to exist following the sale of assets, however, a plaintiff is barred from recovering against the successor corporation under the product-line exception. *Id., citing LaFountain*, 951 F.2d at 547.

While I have already determined that Cruistar is not liable under the product line exception for the reasons set forth

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[13] In addition, other factors militate against the application of the "continuation" exception to KCS in this action. The agreement whereby KCS purchased Cruistar's assets from Bank One, Green Bay, expressly disclaimed any assumption of the liabilities of Cruistar. In addition, while hiring some Cruistar employees after an application and interview process, KCS declared invalid and refused to honor Cruistar Dealer Agreements in existence at the time of the asset purchase.

above, several additional factors make the imposition of successor liability upon KCS under this exception even less appropriate. First, KCS never acquired the assets of Mirro, which manufactured the alleged defective product. KCS acquired the assets of Cruistar through Bank One, Green Bay, and not directly from Cruistar. Just as a potential remedy existing against Mirro or Newell barred Colelli's recovery from Cruistar, so too does it bar his recovery against KCS. Finally, KCS is further removed from any liability because its predecessor corporation, Cruistar, did not dissolve and continues to exist as a viable entity. (Lisle Aff. (Dkt. Entry 44) at 3.); *LaFountain*, 951 F.2d at 547. Indeed, Colelli acknowledges the existence of Cruistar as a viable entity subject to suit by naming it as a defendant in this action.

III. CONCLUSION

For the reasons stated above, the uncontroverted facts do not support any of the exceptions to the general rule of nonliability of successor corporations for the actions of the predecessor corporation so as to impose liability upon Cruistar or KCS.[14] Accordingly, defendants' motion for summary judgment will be granted both as to the claims asserted against them in the complaint (Dkt. Entry 42), and also as to the claims set forth against them in defendant Sandt's cross-claim. (Dkt. Entry 65.) An appropriate Order is attached.

/s/Thomas I. Vanaskie
United States District Judge

DATED: September 19, 1996

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[14] Counsel for Colelli argued that the determination of successor liability is to be made by a jury and not by the Court as a matter of law. He has failed, however, to cite any authority for his contention that the applicability of the exceptions to the general rule of non-liability is to be determined by a jury, as opposed to a court based on apodictic historical facts. Contrary to counsel's assertion, in the cases cited throughout this memorandum, numerous courts have made this type of determination as a mater [sic] of law in light of undisputed material facts.

Supreme Court, U.S.
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No. 97-489

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JAMES COLELLI,

Petitioner,

v.

CRUISER BOATS, a DIVISION OF KCS INTERNATIONAL INC. and CRUISTAR, INC.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS R. JOHNSON
(Counsel of Record)
CARLETON O. STROUSS
DAVID R. FINE
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, Pennsylvania 17101
(717) 231-4500
Attorneys for
KCS International, Inc.
and Cruistar, Inc.

October 16, 1997

Washington, D.C. • THIEL PRESS • (202) 328-3286

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should deny the petition for a writ of certiorari by adhering to its well-established practice of deferring to the federal courts of appeals and the district courts on issues relating solely to state law, particularly when the decisions of the lower federal courts were wholly consistent with state-court precedent.

2. Whether this Court should deny the petition for a writ of certiorari where the decisions below have no precedential value either in Pennsylvania or in New Jersey and, therefore, affect only the parties to this case.

PARTIES TO THE APPEAL

Petitioner is an individual who is a resident of the state of New York. Respondent Cruistar, Inc., is a privately owned corporation with no parent and no subsidiaries and Respondent KCS International, Inc., is a privately owned corporation with no parent and no subsidiaries.

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OPINIONS OF THE COURTS BELOW

Respondents concur in the statement of opinions below recited in the petition.

JURISDICTION

This case comes before the federal courts under their diversity jurisdiction, 28 U.S.C. § 1332(a). This Court has jurisdiction according to 28 U.S.C. § 1254.

FEDERAL STATUTES OR OTHER PROVISIONS INVOLVED

None. The petition raises issues related only to the common law of Pennsylvania.

STATEMENT OF THE CASE

Procedural History

Respondents Cruistar, Inc. ("Cruistar"), and KCS International, Inc. ("KCS"), do not object to the description in the petition of the relevant procedural background.

Petitioner filed his petition for a writ of certiorari to the U.S. Court of Appeals for the Third Circuit on September 16, 1997.

Factual History

James Colelli suffered burns as a result of a fire aboard his fiberglass-hulled boat on June 25, 1993. The hull identification number on the boat indicated that it had been manufactured in 1972 by the Mirro Marine Division of Mirro Corporation.

The parties stipulated below that the Mirro Corporation sold its fiberglass-hulled boat manufacturing assets of the Mirro Marine Division to Cruistar in 1982. Bank One/Green Bay foreclosed on those assets in 1993 and sold them some months later to KCS International, Inc. *See* Memorandum and Order of the District Court (Appendix to the Petition at 5a—6a). As the parties stipulated, Mirro continued to exist after the 1982 asset sale to Cruistar and continues to exist today, although it lost its separate corporate

identity in 1988 and became a division of another corporation.

Petitioner never filed suit against Mirro and, three months after he commenced his action against Cruistar and KCS, the statute of limitations ran as against Mirro. *See* Memorandum and Order of the District Court (Appendix to the Petition at 16a—17a). As the district court held, "the determinative factor in the loss of a remedy against Mirro was Colelli's failure to name the proper defendant." *Id.* at 17a.

Having allowed the statute of limitations to run against the proper defendant, Petitioner was left to argue that the district court should hold Cruistar and KCS liable on a successor-liability theory. Cruistar and KCS moved for summary judgment and the district court ultimately granted the motions.

Before the district court, Petitioner raised a number of arguments in favor of successor liability; however, because he refers to just one in his petition, this discussion will be similarly focused.

In the memorandum accompanying its order granting summary judgment, the district court noted the well-established rule in Pennsylvania against imposing tort liability on successor corporations. *Id.* at 8a. The district court then considered, *inter alia*, an exception to that general rule denominated the "product-line" exception.

The product-line exception, a state-law doctrine, holds that liability can be imposed on a purported successor when all three of the following elements are met: (1) the plaintiff's remedy against the original manufacturer has been virtually destroyed and the destruction is caused by the successor's acquisition of the business; (2) the successor has the ability to assume the original manufacturer's risk-spreading role; (3) it is fair to require the successor to assume a responsibility for defective products as a burden necessarily attached to the original manufacturer's good will. *Id.* at 15a—17a. Importantly, the Pennsylvania Supreme Court has never placed its imprimatur on the "product-line" exception; its use in Pennsylvania law is the result of predictions by the intermediate appellate courts of the state and by the federal courts.[1]

In this case, the district court concluded that the "product-line" exception could not apply because the asset sale from Mirro Corporation to Cruistar in 1982 did not destroy Petitioner's remedy; rather, Petitioner lost his remedy by failing to bring suit against Mirro within the applicable statute of limitations. *Id.* at 17a. This holding did not stretch the law – the Pennsylvania state courts and the

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[1] There are two intermediate appellate courts in Pennsylvania, the Superior Court and the Commonwealth Court. 42 Pa. C.S. § 301. The Pennsylvania Supreme Court exercises largely discretionary review over the decisions of both. 42 Pa. C.S. § 724.

United States Court of Appeals for the Third Circuit had applied the exception in the same way. *See Conway v. White Trucks,* 885 F.2d 90, 93—97 (3d Cir. 1989) (emphasis added) (". . . we predict that the Pennsylvania Supreme Court, if it were to adopt the product line exception, would require the virtual destruction of the plaintiff's remedies against the original manufacturer ***caused by*** the successor's acquisition . . . We predict . . . that [Pennsylvania] would not apply [the product line] exception in cases where the claimant had a potential remedy against the original manufacturer, but failed to exercise all available means to assert his or her claim."); *LaFountain v. Webb Industries Corp.*, 951 F.2d 544, 547 (3d Cir. 1991), *quoting South Bend Lathe, Inc. v. Amsted Indus.*, 925 F.2d 1043, 1047 (7th Cir. 1991) ("[t]he continuation of the predecessor corporation bars recovery from the successor under the product line rule in every decision we have found that considers the issue."); *Keselyak v. Reach All, Inc.*, 660 A.2d 1350, 1354 (Pa. Super. 1995) (asset acquisition must cause the loss of remedy).

Petitioner appealed the entry of summary judgment in favor of Cruistar and KCS and the Third Circuit, by judgment order dated June 26, 1997, affirmed.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. The issues presented in the petition are wholly matters of Pennsylvania state law and this Court should apply its well-established rule of deferring to the federal courts of appeals and the federal district courts on matters of state law.

The Court's consideration of a petition for a writ of certiorari is guided by a number of criteria: whether there is a split of authority in the lower federal courts, whether the court of appeals has decided an important federal question in a way that conflicts with a decision by a state court of last resort, whether a lower federal court has so far departed from the accepted and usual course of judicial proceedings or whether the petition presents an important question of federal law that has not been, but should be, settled by this Court. Supreme Court Rule 10.

The petition never recites these guidelines and for good reason: the questions Petitioner would put to this Court do not fall within any of the categories described.

As Petitioner must concede, his petition is bereft of any claim under the federal Constitution or any federal statute. Instead, the decisions of the district court and of the court of appeals rest entirely on an interpretation of Pennsylvania common law.

More precisely, the district court granted summary judgment in favor of Respondents because it found that, as a matter of Pennsylvania common law, they could not be held liable in a products-liability case for a boat manufactured by an alleged corporate predecessor. The only basis for federal jurisdiction was diversity of citizenship, 28 U.S.C. § 1332(a), and Petitioner raised no federal issues before either the district court or the court of appeals.

This Court has a long-standing practice by which it will "not ordinarily review the holding of a court of appeals on a matter of state law. . ." *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967); *see also, Wolf v. Weinstein*, 372 U.S. 633, 635 (1963) (. . . the controversy . . . primarily implicates questions of Pennsylvania law and presents no federal question of substance. In the circumstances, the writ of certiorari as to that judgment of the Court of Appeals is dismissed as improvidently granted."); *Cort v. Ash*, 422 U.S. 66, 72 (1975); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985); *Leavitt v. Jane L.*, 116 S.Ct. 2068, ___ (1996).[2]

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[2] The predecessor of Supreme Court Rule 10, Rule 19 of the 1970 rules, included among the bases for granting certiorari those situations in which the federal court of appeals has "decided an important state or territorial question in a way in conflict with applicable state or territorial law." Notably, when the rules were revised (and renumbered) in 1980, this enumerated basis for

In the case at bar, Petitioner has framed the issues for review as (1) whether the Third Circuit misapplied Pennsylvania law in light of a recent decision of an intermediate Pennsylvania appellate court and (2) whether the Third Circuit inappropriately applied the law because courts in New Jersey have applied a slightly different analysis.[3] These issues are purely based in state law and there is no reason for the Court to depart from its traditional reluctance to review decisions of the courts of appeals rooted in state law.

The Court should deny the petition.

II. The Court should deny the petition because there is no "sharp divergence" between the analysis applied by the lower courts in this case and the well-established caselaw in Pennsylvania.

Petitioner suggests that the analysis applied by the lower federal courts in this case is somehow at odds with the precedent of the Pennsylvania state courts. Petitioner cites *Childers v. Power*

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granting certiorari was eliminated. *See* Supreme Court Rule 10.

[3] Notably, although Petitioner describes the intermediate Pennsylvania decision as "recent," it was filed – and published – more than a month before the district court held oral argument on Respondents' summary-judgment motion.

Line Equipment Rentals, Inc., 681 A.2d 201 (Pa. Super. 1996), as supporting a result different than that reached by the district court and the court of appeals in the case at bar.[4]

Although there are significant factual distinctions that differentiate this case from *Childers*, Respondents will direct their argument to the standard by which this Court will consider the petition for a writ of certiorari.[5]

As an initial matter, even if one assumes, *arguendo*, that Petitioner is correct that there is

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[4] Although the point is largely irrelevant, Respondents are constrained to note an inaccuracy in the petition. Petitioner's description of the subsequent appellate treatment of *Childers* states that the Pennsylvania Supreme Court has granted allocatur – its form of discretionary review -- to consider the Superior Court decision. *See* Petition at 10. In fact, the Pennsylvania Supreme Court denied the petition for allocatur in *Childers*. 690 A.2d 236 (Pa. 1997).

[5] One of the more significant of these distinctions is that the Pennsylvania Superior Court described a rule that applied where "one corporation acquires ***all*** of the manufacturing assets of another corporation . . ." *Childers*, 681 A.2d at 213 (emphasis added). In the case presented in the instant petition, the parties stipulated that Mirro sold only one portion of its manufacturing assets to Cruistar. *See* Petition at 5.

some disparity between the application of the "product-line" exception in this case and the application of that doctrine in *Childers*, the point is immaterial because the district court was not obliged to follow *Childers*. It is hornbook law that a federal court exercising its diversity jurisdiction is to apply the law of the state as set down by the state's highest court. *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967). Where the state's highest court has not addressed an issue of state law, the federal court is to predict how that court would decide the matter. *Id.* The federal court may look, among other things, at decisions of the state's intermediate appellate courts. *Id.*

Childers is the product of an intermediate Pennsylvania appellate court and, to the extent that it recites a permutation of the "product-line" exception different than that applied by the lower federal courts in this case, *Childers* is not controlling. *Estate of Bosch*.[6] Moreover, as noted in the well-reasoned decision of the district court in this case, there is significant authority from the same intermediate appellate court – the Pennsylvania Superior Court – to suggest that the

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[6] Of course, even if the district court and the court of appeals had misapplied Pennsylvania law, that would not warrant a grant of certiorari. *See* Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1933*, 48 HARV. L. REV. 238, 269-70 ("The Supreme Court cannot undertake to see that every case in a federal court is decided as a state court would have decided it.").

Childers approach is an aberration. *See, e.g. Keselyak v. Reach All, Inc.*, 660 A.2d 1350 (Pa. Super. 1995); *Dawejko v. Jorgenson Steel Co.*, 434 A.2d 106, 110 (Pa. Super. 1981). Accordingly, if this Court accepts Petitioner's reading of *Childers*, it can conclude only that there is a conflict among the panels of the Pennsylvania Superior Court, a conflict that should be resolved by the Pennsylvania Supreme Court (or an *in banc* Pennsylvania Superior Court) rather than by this Court. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) ("the voice adopted by the state as its own . . . should utter the last word.").

Critically, very few jurisdictions have accepted the "product-line" exception and the Pennsylvania Supreme Court has not resolved the issue definitively in that jurisdiction. *Dawejko*, 434 A.2d at 110. Accordingly, Petitioner is asking this Court not only to review the lower federal courts' analysis of a state-law doctrine but also to assume that the highest court in the state would agree that the doctrine has a place in Pennsylvania law. The Court's assumption of such a role would stand the *Erie* rule on its head. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983). It would also establish a scenario in which this Court's interpretation of Pennsylvania law could be "overruled" by the Pennsylvania Supreme Court when that court addressed the product-line exception.

III. The Court should deny the petition because, even if it were to credit Petitioner's claim that a recent decision of an intermediate Pennsylvania appellate court diverges from the analysis applied by the district court in this case (and affirmed by the court of appeals), the issue was waived.

Petitioner has waived his argument. As Petitioner must concede, the district court adhered closely to the analysis of the "product-line" exception in the published decisions of the Third Circuit (as the district court was bound to do).

The Third Circuit panel that considered this matter was likewise bound to follow the published precedents of that court. *See* Third Circuit Internal Operating Procedure 9.1 ("It is the tradition of this court that the holding of a panel in a reported opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a published opinion of a previous panel. Court in banc consideration is required to do so.").

The district court and the Third Circuit panel below followed the line of authority set down by the Third Circuit in *Conway v. White Trucks,* 885 F.2d 90 (3d Cir. 1989), and *LaFountain v. Webb Industries,* 951 F.2d 544 (3d Cir. 1991). Therefore, if Petitioner wished to preserve the issue he now raises for this Court's review, he was required to petition the Third Circuit for an *in banc* rehearing to overrule the prior precedent. He did not do so

and, accordingly, the issue has not been preserved for this Court's review.

IV. Petitioner's argument that New Jersey law should have some bearing on the determination of the lower federal courts in this diversity-jurisdiction matter is wholly without merit because the instant case is governed by Pennsylvania common law and the federal courts, sitting in diversity, properly applied Pennsylvania law.

Petitioner suggests that this Court should review the instant matter because "other Third Circuit states such as New Jersey show a sharp divergence from the federal court's interpretation of this issue." Petition at 17. He further argues that

> [t]o allow the Third Circuit to sanction the line of cases relied upon by Judge Vanaskie [the district court judge in the instant case] would provide precedent for district courts in New Jersey to follow. Therefore, federal courts in New Jersey could possibly diverge from state law in the same manner as in Pennsylvania

Petition at 19-20. Petitioner offers an alternative scenario, concluding that "[t]his would lead to a conflict within the Circuit that could create chaos." Petition at 20.

There is no reason to dwell long on Petitioner's argument. As an initial matter, it is illogical. Petitioner seems to argue that, because the courts of Pennsylvania and New Jersey are within the federal Third Circuit and because they have incorporated parts of one anothers' analyses of the "product-line" exception, the result in this case would somehow wreak havoc on the law of New Jersey. The district court in this case applied Pennsylvania law as it was required to do; the Third Circuit affirmed by judgment order. The case did not implicate New Jersey law and, presumably, the Third Circuit would apply an appropriate standard were it to review a case arising from New Jersey.

Petitioner's argument seems to presume that the Third Circuit, the U.S. District Court for the District of New Jersey and the New Jersey state courts are unable to discern between Pennsylvania and New Jersey law and would somehow uproot the law of that state in deference to an unpublished decision by a district court in Pennsylvania that clearly indicated it was applying Pennsylvania law.

Put another way, Petitioner is suggesting that the Third Circuit had some duty to reconcile the common law of two states as though Pennsylvania and New Jersey are not free to diverge from one another. The court of appeals had no such duty and, of course, such an exercise would run afoul of *Erie*.

Beyond that, the decisions of the lower federal courts in this case do not establish any precedent. The district court did not publish its decision and, even if it had, district court decisions are not binding on any other court (indeed, they are not even binding on other judges of the same district court). *See Chemetron Corp. v. Jones*, 72 F.3d 341, 352 (3d Cir. 1995); *Threadgill v. Armstrong World Indus.*, 928 F.2d 1366, 1371 (3d Cir. 1991). The Third Circuit affirmed with a judgment order that, likewise, has no precedential import. *See* Third Circuit Internal Operating Procedure 5.8 ("Because the court historically has not regarded unpublished opinions as precedents that bind the court, the court by tradition does not cite to its unpublished opinions as authority.").

Accordingly, Petitioner's attempt to cast this case as one with dire results for both Pennsylvania and New Jersey courts is belied by the lower courts' clear reliance on Pennsylvania law and by the procedural posture of this case; the only effect of the decisions of the lower federal courts in this case is on the litigants named in the caption. The case should not, therefore, command the resources of this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

THOMAS R. JOHNSON
(counsel of record)
CARLETON O. STROUSS
DAVID R. FINE
Attorneys for KCS International, Inc. and Cruistar, Inc.

KIRKPATRICK & LOCKHART LLP
240 NORTH THIRD STREET
HARRISBURG, PENNSYLVANIA 17101
(717) 231-4500

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NO. 97-489 (3)

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1996

JAMES COLELLI,

Petitioner

vs.

KENNETH A. SANDT, T/A AND D/B/A IST KLAS
MARINA AND CRUISER BOATS, A DIVISION OF
KCS INTERNATIONAL, INC., AND CRUISTAR, INC.

Respondents

WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

LENAHAN & DEMPSEY, P.C.
JOSEPH P. LENAHAN
LISA G. WILSON
ATTORNEYS FOR PETITIONER

SUITE 400, KANE BUILDING
116 N. WASHINGTON AVENUE
P.O. BOX 234
SCRANTON, PA 18501-0234
(717) 346-2097

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I. REASONS FOR ALLOWANCE OF THE WRIT:

A. THE COMPELLING ISSUES PRESENTED IN THE PETITION FALL SQUARELY WITHIN SUPREME COURT RULE 10(A) THEREFORE, REVIEW ON CERTIORARI SHOULD BE GRANTED.

Contrary to the Respondent's argument, the compelling issues raised in the Petition fall within the category described in Supreme Court Rule 10(a) which states that the Supreme Court will consider review where:

> A United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.
> (Emphasis added).

It is clear, for the reasons set forth in the Petition that the Third Circuit sanctioned the District Court's continuing divergence from Pennsylvania case law on the issue of successor-in-interest liability when it affirmed Judge Vanaskie's Order of September 19, 1996.

Respondent argues that this Court has a long-standing practice by which it will "not ordinarily review the holding of a Court of Appeals on a matter of state law . . ." Pierson v. Ray, 386 U.S. 547, 558 N.12 (1967). Of course, this Court does not "ordinarily" review many types of cases because review is discretionary. Therefore, each case must be reviewed independently using Supreme Court Rule 10 as a guideline to determine whether compelling reasons exist for review.

Moreover, the footnote cited by the Respondent in Pierson does not suggest that those Petitions that deal with interpretations of state common law are automatically excluded from consideration.

For these reasons, the Court should grant the Petition.

B. CONTRARY TO RESPONDENT'S ASSERTIONS, THE PETITIONER HAS NOT WAIVED ANY ISSUE IN THIS MATTER.

The respondent argues that because the Petitioner did not request a rehearing in banc before the Third Circuit, he has waived his argument.

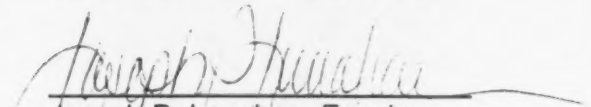
There simply is no merit to the Respondent's argument. There is no procedural requirement that before an appeal is taken to the Supreme Court, a rehearing in banc must be requested otherwise all issues involving holdings of prior panels will be waived. Of course, respondent does not, nor could he, cite any case law in support of this bold assertion.

For these reasons, the Court should grant the Petition.

CONCLUSION:

For these reasons, the Petitioner respectfully requests this Honorable Court to grant his Petition for Certiorari.

LENAHAN & DEMPSEY, P.C.



Joseph P. Lenahan, Esquire

Lisa G. Wilson, Esquire

116 N. Washington Avenue, Suite 400
P.O. Box 234
Scranton, PA 18501
(717) 346-2097

October 24, 1997

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

JAMES COLELLI	)	
Petitioner	)	
	)	
vs.	)	
	)	
CRUISER BOATS, a Division of KCS INTERNATIONAL, INC. and CRUISTAR, INC.,	)	
	)	**NO. 97-489**
Respondent	)	

CERTIFICATE OF SERVICE

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